O/a 6-5-84

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

BURROUGHS CORPORATION, a Michigan corporation, JAMES ROSS and ROBERT MADDEN,	:	
Petitioners,	:	
vs.	:	CASE NO. 64,109
SUNTOGS OF MIAMI, INC., a Florida corporation,	:	
Respondent.	:	

PETITIONERS' REPLY BRIEF

GILBRIDE, HELLER & BROWN, P.A.
One Biscayne Tower, Suite 1946
Miami, Florida 33131
305/358-3580

Attorneys for Petitioners

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ARGUMENT

I. SUNTOGS HAS IGNORED THIS COURT'S MANDATE AND PETITIONER'S ANALYSIS BY FAILING TO SET FORTH WHAT "STRONG PUBLIC POLICY OF FLORIDA" EXISTS SO AS TO VOID A VALID CHOICE OF LAW PROVISION IN A STATUTES OF LIMITATION SETTING.

Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla. 1981) clearly requires an in depth analysis as to whether or not any contractual provision is against the "strong public policy" of the State of Florida in a choice of law setting.

> We do not think the mere fact that there exists in Florida a usury statute which prohibits certain interest rates establishes a strong public policy against such conduct where interstate loans are concerned. Continental at 507, 509.

It is Petitioner's belief that this Court accepted jurisdiction in this matter in order to weigh the various considerations as to whether or not a valid choice of law provision lowering the Statute of Limitations should be accepted as the law of this state or whether or not it should be rejected as against the "strong public policy" of the State of Florida. Accordingly, Petitioner painstakingly reviewed each conceivable argument in its initial Brief (pages 5 through 21) and came to the inescapable conclusion that few, if any public policy considerations could even be thought of that should be used in favor of declaring void the free choice of the contracting parties in choosing Michigan law to lower the time for bringing suit. Petitioner challenged Respondent to enumerate what conceivable strong public policy arguments could be made to offset those set forth in its Brief.

Respondent failed to accept this challenge and simply

reiterated the position of the lower court that because a Florida statute does not permit the lowering of a statute of limitations it is a "manifestation of strong public policy" and is therefore void. (Respondent's Brief at 14).

To accept this reasoning would be tantamount to saying that each and every valid choice of law provision that in anyway conflicts with the statutes of Florida automatically renders said provision void against public policy. This is the type of reasoning that was clearly and soundly rejected in Continental, supra, and Morgan Walton Properties, Inc. v. Intern. City Bank & Trust Co., 404 So.2d 1059 (Fla. 1981). Respondent has not attempted to weigh or analyze the public policy considerations in favor of voiding the choice of law provision lowering the statute of limitations in this cause for one simple reason--It realizes no compelling public policy exists and can offer no substantial arguments to counteract those set forth in Petitioner's Brief.

Particularly instructive on this question is the manner in which other states have also dealt with the issue as to whether or not the lowering of a statute of limitations by contract is against the public policy of those states. Overwhelmingly, those states that have decided the issue have ruled that such a contractual provision is not against public policy. Although this issue has not arisen in a choice of law context, it is important to note that in determining that a contractual lowering of the statute of limitations is not against public policy, the various courts went through an analysis much the same that this Court must do when determining whether or not "strong public policy considerations" exist so as to avoid the choice of law provision in light of §95.03 Fla. Stat. (1981).

A brief analysis of those cases follows:

The Supreme Court of Michigan has recently ruled that no violation of public policy or basic unfairness exists in permitting two parties to lower contractually the various statutes of limitation. See Camelot Excavating Company v. St. Paul Fire and Marine Ins. Co., 301 N.W. 2d 275 (Mich. 1981). The court indicated that the general rule followed by most courts has been to uphold provisions in private contracts limiting the time to bring suit as long as the limitation is reasonable, even though the period specified is less than the applicable statute of limitations. The court relied on various cases in other jurisdictions in support of this proposition:

> Plaintiff Camelot contends that in any event public policy should bar contractual limitations by private parties which are shorter than the six year statutory period of limitations. Generally the weight of authority in Michigan and elsewhere is against this proposition. See, The Tom Thomas Organization, Inc. v. Reliance Insurance Co., supra, 396 Mich. 592, 242 N.W. 2d 396, Goosen v. Indemnity Insurance Company of North America, 234 F.2d 463 (Ca. 6 (1956) Comm'r of Ins. v. Central West Casualty Co., 301 Mich. 4273 N.W. 2d 830 (1942); Ladies of the Modern Maccabees v. Illinois Surety Co., 196 Mich. 27, 163 N.W. 7 (1917); Forest Twp. v. American Bonding Co. of Baltimore, 187 Mich. 657, 154 N.W. 26 (1915). See, also Cook v. Heinbaugh, supra, 32 N.D. 1003-1004, 155 N.W. 867; Lesher v. United States Fidelity & Guaranty Co., supra, 239 Ill. 511, 58 N.E. 208; McGarry v. Seiz, supra, 129 Ga. 299, 58 S.E. 856.
>
> More specific recent decisions have issued in other jurisdictions which serve to further undermine Plaintiff's public policy argument. In Georgia, for instance, any argument that public policy prohibits such reasonable contractual limitations as contained in the instant case has been soundly rejected. Sam Finley, Inc. v. Interstate

Fire Ins. Co., 135 Ga. App. 14, 217 S.E. 2d (1975). Camelot at 280 and 281. (Emphasis added).

The Supreme Court of Michigan went on to hold:

> We find no violation of public policy or basic unfairness in allowing the enforcement of this private contractual period of limitations, even though shorter than the statutory period normally applicable. The period provided was reasonable. Neither do we find a violation of public policy in the fact that plaintiff failed to discover the contract prior to its limitation. Plaintiff had a year in which to investigate possible bases of recovery. It failed to initiate any action during the period when recovery for its work was possible.
>
> We might feel different had the limitation provision been constructed in such a way that plaintiff could not have reasonably discovered its loss prior to the point at which the limitation period ran. Cook v. Northern Pacific R. Co., supra, 32 N.D. 250-251, 155 N.W. 867; Sheard v. United States Fidelity & Guaranty Co., supra, 58 Wash. 35, 109 P. 276. However, in this case...plaintiff could have discovered the existence of the bond contract and the fact that Priestly had abandoned the work. Camelot at 282. (Emphasis added).

In Amoco Canada Petroleum Company, Ltd. v. Lake Head Pipeline Company, Inc., 618 F.2d 504 (8th Cir. 1980), the appellate court interpreting Wisconsin law stated as follows:

> Parties to a contract normally are free to set a limitation period for bringing suit that is shorter than that provided by the applicable statute of limitation; it is only when the contractual limitation period is unreasonably short that it is void as violative of a public policy...applying this standard, courts almost invariably uphold contractual limitation periods of six months or more, especially where the parties have equal

> bargaining power and the limitation period does not effectively preclude the plaintiff's remedy. (Citations omitted).
>
> Applying the above standards the court can see no reason why this particular contractual limitation period should be declared void as against public policy. This is certainly not a case of overreaching by Lake Head or one where Amoco was in an unequal bargaining position. Nor is this a case where Amoco's remedy was effectively eliminated by the contractual provisions; ...under these circumstances, if the parties by valid contract, with consideration and mutual assents agree to a six month limitation period, no significant public policy is impinged by enforcing such a contractual provision. Indeed, the opposite is more likely true; public policy is furthered when valid commercial contracts between large corporations of equal bargaining power are enforced by the courts. Amoco, at 506. (Emphasis added.)

In Alderney Dairy Co., Inc. v. Hawthorne Mellody, Inc., 643 F.2d 113 (3d Cir. 1981), lowering the statute of limitations to a period of one year was deemed not to be against the public policy of New Jersey. The Appellate Court added that the intent to limit the period to one year must be clearly and unambiguously set forth in the agreement.

In reviewing the cases cited above and the multitude of citations contained therein, it is clear that a contractual lowering of a statute of limitations is universally accepted as long as the period set forth in the contract is clear and unambiguous; the period is reasonable and that the contract was executed in a commercial setting. All of these criteria apply to the case at bar. It must again be stressed that even though the Burroughs-Suntogs contract could have lowered the period to one year pursuant to Michigan law, a longer, more reasonable period of two years was actually chosen. In all of the cases cited above, provisions

lowering the limitations ranged anywhere from six months to one year and were still held to be reasonable.

The Fifth Circuit Court of Appeals in Delhomme Industries Inc. v. Houston Beachcraft, Inc., 669 F.2d 1049 (1982) was confronted with a choice of law question wherein a different result would be realized if the law of the chosen state as opposed to that of the forum were applied. Although not raised in a statutes of limitation setting, the reasoning of the court in upholding the choice of law provisions is both relevant and compelling:

> A mere difference in the local law rules of two states will not render the enforcement of a claim created in one state contrary to the public policy of another. Courts favor and tend to uphold choice of law provisions in contracts. See, R. Weintraub, Commentary on Conflicts of Law, §7.3C at 355 (2d 1980). Particularly when such contracts are used in interstate transactions (citations omitted) finally a court will be more likely to uphold the provisions of a contract made in a business transaction than the terms impressed by adhesion on an unknowledgeable consumer. Id, §7.4E, at 378 (the more commercial the context of the transaction...the greater the need for validation and the stronger the presumption of validity). See, Id §7.5 Delhomme at 1058 and 1059.

Delhomme points out that additional considerations of commercial comity and validation are furthered when choice of law provisions are upheld in interstate commercial transactions.

Respondent contends in its Brief that there is a "broad general rule" that any agreements violative of a Florida statute are void. As noted in Continental, supra, these broad statements are of no effect in a choice of law setting since many of them stand for the truism that an agreement against public policy is unenforceable, but do not delineate public policy in terms of a

statute of limitations. Continental at 509 and 510. Moreover, the cases involving covenants not to compete are inopposite since they do not help the litigants or the courts understand the strength of the very different policies underlying the laws involving statutes of limitations. All of the cases cited by the Respondent in an attempt to show this Court that the choice of law provision is contrary to the "strong public policy" of the State of Florida are clearly inapplicable.

II. RESPONDENT IS INCORRECT IN ITS ASSUMPTIONS THAT MICHIGAN DOES NOT BEAR A REASONABLE RELATIONSHIP TO THE TRANSACTION, THAT ALLEGATIONS OF FRAUD IN THE INDUCEMENT VOID THE CHOICE OF LAW PROVISION AND THAT THE STATUTE OF LIMITATIONS OF THE FORUM CONTROLS.

Perhaps because Respondent has realized that it has no valid argument to show that the strong public policy of the State of Florida is violated by enforcing a choice of law provision in a statutes of limitation setting, Respondent shifts its attack by raising three falacious points in an attempt to circumvent the real issue to be decided by this Court.

A. Does the transaction bear a reasonable relation to the State of Michigan.

It is unquestioned that the most significant contacts in this cause lie with the State of Florida. Through our statutes and case law, however, all that need be shown to validate a choice of law provision is that some reasonable contact or reasonable relationship exist with the chosen state. See, §671, 105(1) Fla. Stat. (1981), and Continental, supra. Respondent contends simply because Burroughs Corporation is a Michigan corporation, with its principal place of business and activity in Michigan that these

contacts are insufficient to support the reasonable relationship test. Respondent of course ignores the fact that Suntogs itself conducts business within the State of Michigan (Petitioner's initial Brief at 3). In Continental, supra, this Court stressed that the two "most significant" contacts with Massachusetts were the fact that Continental was domiciled and had its principal place of business in that state. Continental at 513. Thereafter, "minor" contacts were enumerated.

The entire purpose of permitting two commercial parties to choose the law of another state that has some "reasonable relationship" with that state is clearly applicable in this situation. That is, neither the courts nor the legislature wish contracting entities to pick the laws of states that have absolutely no connection with the parties or the transaction when it is abundantly clear that the choice of law provision is simply being used to permit one party to gain some type of advantage over the other. This is not the case herein. Other than Florida, there is no state other than Michigan that has a more reasonable relationship with the parties or the transaction. The rule of law should be that as long as one of the contracting parties is incorporated in the chosen state, domiciled in the chosen state, and has its principal place of business in the chosen state, those contacts in and of themselves are sufficient to uphold any choice of law provision. It should further be stressed that unlike in Continental, supra, this cause was decided by Summary Judgment before trial. Burroughs Corporation could show additional contacts with the State of Michigan in this transaction if necessary (salesmen who sold the B-700 to Suntogs were trained in Michigan, the contract was prepared in Michigan, and the underlying development and design of

the B-700 took place in Michigan are only some small examples). It is respectfully submitted, however, that the correct rule of law in any choice of law setting should be that as long as one of the contracting parties is domiciled and has its principal place of business in the state whose law has been freely chosen by the parties, those contacts are sufficient to establish a reasonable relationship with the state so chosen.

B. Suntogs cannot now claim that the contract is void after seeking to enforce its provisions for so many years.

Suntogs acknowledges that it commenced its proceedings on January 23, 1978 based upon representations made by the Petitioner in April of 1975 "and discovered by Plaintiff to be fraudulent in November of 1975." (Respondent's Brief at 1). Despite the fact that Suntogs allegedly discovered Burroughs' "fraudulent activity" in November of 1975, Suntogs elected to bring suit in contract in January of 1978. Nowhere in the lower court proceedings did Suntogs in any way disavow or try to negate its contractual claims in the lower court. Indeed every action of Suntogs expresses an intent and desire to seek judgment against Burroughs for alleged breaches of said agreement. That is, Suntogs has at all material times tried to enforce the terms of the contract by obtaining damages for breaches thereof. Suntogs at no point in time tried to reject or repudiate the agreement as being procured or induced by fraud.

It was only after Summary Judgment was entered on behalf of Burroughs in February of 1982 that Suntogs first raised the issue that the choice of law and statute of limitations provision were voidable because of the alleged fraud in the inducement.

That is, for a period of in excess of six years (November of 1975 through February, 1982), Suntogs has been seeking to enforce its contractual rights against Burroughs. It cannot now claim that the contract is voidable.

> A voidable contract, on the other hand is valid and binding until it is avoided by the party entitled to avoid it. In other words, it is one that is capable of being affirmed or rejected at the election of one of the parties. It will be binding if he elects to affirm it, but will be of no effect if he chooses to reject it. Examples of voidable contracts are those induced by fraud and misrepresentation, duress and those made by infants or incompetent persons. 11 Fla. Jur. 2d Contracts, §7. (Emphasis added).

If indeed the contract was voidable at the election of Suntogs, it had ample time to make that election. Unlike an election of remedies which a party has the right to put off until time of trial, this is not a situation involving the choosing of inconsistent remedies (i.e. rescission versus damages). This is a conscious decision a litigant must make either to void a voidable contract, or affirm it. Suntogs admits that it learned of the alleged fraud in November of 1975, but proceeded to try to collect damages on the theory of breach of contract through this date. Suntogs has elected to affirm the contract and it is binding on both parties. As further evidence thereof, all one need do is carefully review Suntogs' Amended Complaint (A. 1-15). Suntogs did not seek rescission, but rather only sought the remedy of damages for breach of contract. Suntogs has affirmed the agreement, is seeking damages thereunder, and must live with all the terms of the contract.

Even if this court were to rule that Suntogs has not

made such an election, a finding which is belied by every fact in this case, Suntogs would still have to prove fraud in the inducement if this case were to come to trial. The "fraud" in this case as alleged by Suntogs is that Burroughs Corporation told Suntogs that the Silton Data software would definitely work on the Burroughs B-700 when in truth and in fact Burroughs knew that it would not. Burroughs refers this court to the written contract (A. 27) between the parties:

> Customer acknowledges that Burroughs has made no representations or warranties to the customer with respect to any non-Burroughs software, its performance on the Burroughs equipment, or the service to be provided with respect to such non-Burroughs software, including, but not limited to software and services to be furnished to customer by Silton Data Center, and Burroughs shall incur no liability to customer arising out of the use of such non-Burroughs software or the furnishing of such services.

It is respectfully submitted that the "issue" of fraud in the inducement is a figment of Suntogs' imagination and Suntogs could not possibly prevail in such a claim at trial. The issue of whether or not Suntogs can use the argument of fraud in the inducement to vitiate the contract, however, has been determined by Suntogs' conduct in attempting to enforce the agreement.

C. <u>The statute of limitations of the forum does not control</u>.

None of the cases cited by Respondent for the proposition that the statute of limitations of Florida controls involves a choice of law setting. Because of this, the axiomatic rule that the statute of limitations of the forum controls is of no real relevance.

The parties have chosen to lower the statute of limitations pursuant to Michigan law and the only prohibition against

doing so should be the strong public policy of the State of Florida, if of course such policy exists. It is elementary that various clauses in a contract should be construed justly, reasonably, and in favor of validity. See, in general, 11 Fla. Jur. 2d Contracts §§101-103. It is abundantly clear that a just construction requires either a Florida or Michigan court to hold that it was the Michigan statute of limitations that was lawfully and properly lowered to two years by the contracting parties.

Even in traditional statutes of limitation settings, Florida courts do not automatically apply the statute of limitations of the forum. In Quarty v. Insurance Company of North America, 244 So.2d 183 (Fla. 2d Dist. Ct. App. 1971), a Florida resident brought suit in Florida for breach of a homeowner's policy that was executed in New York, by New York residents (Plaintiff thereafter moved to Florida) with the property located in New York where the loss occurred. The contract required suit to be brought within twelve months of the loss and did not contain a choice of law provision. The Second District Court of Appeal stated that §95.03 Fla. Stat. making void any provisions of a contract fixing the time in which suits may be instituted under the contract at a period of time less than that provided by the Florida statute of limitations was inapplicable because of the multitude of contacts with New York. The Court held that the twelve month period set forth in the contract was valid and that the statute of limitations fixed by the contract was binding on the plaintiff. The Florida statute of limitations and §95.03 were not invoked. See, also Holderness v. Hamilton Fire Insurance Company of New York, 54 F. Supp. 145 (S.D. Fla. 1944).

The case also stands for the proposition that the Appellate Court could find no "strong public policy" to enforce §95.03 Fla. Stat. even though suit was filed in Florida, the Plaintiff had become a Florida resident and the Plaintiff was an individual consumer.

III. THE PARTIES CONTRACTUALLY AGREED THAT ANY NEGLIGENCE CLAIM INVOLVING NEGLIGENT BREACH OF CONTRACT WAS ALSO TO BE GOVERNED BY THE TWO YEAR STATUTE OF LIMITATIONS FIXED BY THE CONTRACT.

Suntogs, besides bringing suit on various theories of breach of contract, also has maintained an action for negligent breach of contract. Although Suntogs properly cites various cases for the proposition that negligent performance of a contractual duty supports an independent tort action, Respondent is confused in believing that said independent action is not barred by the contractually imposed two year limitation period.

The pertinent contractual provision states that:

> No action arising out of any claimed breach of the agreements or obligations under the agreements may be brought by either party more than two years after the cause of action has accrued.

Obviously, negligent breach of the contract is an "action arising out of...obligations under the agreements." Whether you bring suit in negligence or breach of contract does not alter or change Suntogs' contractual obligation to bring suit within the two year period.

It is not really important what statute of limitations is being lowered under Michigan law. In Camelot Excavating Company v. St. Paul Fire & Marine Insurance, 301 N.W. 2d 275 (Mich. 1981), the Supreme Court of Michigan held that any statute of

limitations (whether negligence, or contract) can be lowered by the mutual agreement of the parties as long as said provision was reasonable and unambiguous. It does not matter what the applicable Michigan statute of limitations is since both the contractual and negligence statutes were properly fixed at two years by the contract.

A case in point is Amoco Canada, supra. The Plaintiff brought suit in both negligence and breach of contract with the same type clause limiting Plaintiff's right to do so to a period of six months. Both the negligence and breach of contract actions were time barred because it was not filed within the six month period.

> The complaint alleges negligence and breach of contract arising from a rupture in Lake Head's pipeline resulting in a loss of natural gas belonging to Amoco. The District Court granted Lake Head's renewed Motion for Summary Judgment holding the action was barred by a six month contractual limitation for bringing the suit. On appeal, Amoco alleged (1) the limitation would not apply to the negligence claim; and (2) enforcement of the contractual limitation would be against public policy. We affirm the District Court. Amoco at 505.

Pleading negligence does not relieve Suntogs of its obligation to bring said action within two years. The claim is clearly time barred.

IV. THE FRAUD ACTION IS TIME BARRED.

Suntogs admits that it discovered Burroughs' actions to be "fraudulent" in November of 1975(Respondent's Brief at 1), but did not bring suit on that fraud for a period in excess of two years thereafter.

The statute of limitations for a fraud action does not commence to run until a party actually discovered said fraud or should have discovered same with the exercise of reasonable diligence. See, in general, 27 Fla. Jur. 2d, Fraud and Deceit, §78.

Suntogs' admission is clearly binding on it, and the limitations period began to run in November of 1975 when it admits that it discovered the fraud.

It must be stressed that there is no provision in the contract holding Burroughs harmless against any fraudulent acts it may have perpetrated or requiring Suntogs to waive any damages as a result of the alleged fraud. Such a provision would be repugnant to public policy and encourage certain parties to fraudulently enter into contracts knowing that they cannot be held accountable for their misdeeds. It should be the public policy of any state to strike down such a clause.

What is before the court, however, is no such provision. The only provision impacting on any alleged fraudulent activity of Burroughs is that clause which lowers the statute of limitations to two years for any obligation that has arisen between the parties. If the contract was breached, if Burroughs committed negligence, or if Burroughs committed actual fraud, Suntogs had two years to bring its action from the date it "knew or should have known" of the act in question. By its own admission more than two years lapsed prior to the institution of suit and Suntogs' allegations of fraud are time barred.

CONCLUSION

For the reasons set forth in Petitioner's initial and reply briefs, Summary Judgment should be entered in favor of Burroughs and against Suntogs.

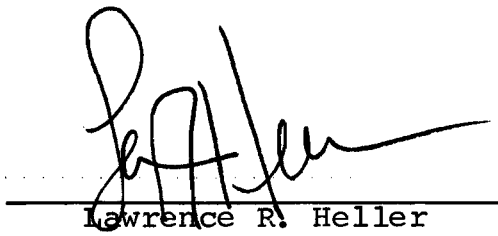
Respectfully submitted,

GILBRIDE, HELLER & BROWN, P.A.
Attorneys for Petitioner
Suite 1946 One Biscayne Tower
Miami, FL 33131
305/358-3580

By _____
Lawrence R. Heller

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was hand delivered this 10th day of May, 1984 to Richard S. Banick, Esq., 25 West Flagler Street, Miami, FL 33130, Weintraub, Weintraub, Seiden, Dudley & Press, 2250 S.W. 3rd Avenue, 5th Floor, Miami, FL, Hoffman & Hertzig, P.A., 250 Catalonia Avenue, Coral Gables, FL 33134.



Lawrence R. Heller